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State v. Lemmons Respondent's Brief 2 Dckt. 41278

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Appellant-Cross Respondent, vs. BRYANN KRISTINE LEMMONS, Defendant-Respondent-Cross Appellant.	)	Nos. 41278, 41279 Twin Falls Co. Case Nos. CR-2011-14836, CR-2012-10131

REPLY/CROSS RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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The District Court Erred Because The Verdict Was Not Contrary To The Law Or Evidence

A. Introduction

A new trial may be granted if the jury verdict was contrary to the law or the evidence. I.C. § 19-2406(6). The state's contention on appeal is that the evidence showed that Lemmons represented she was delivering an ounce of methamphetamine; the law provides that the amount of the delivery for trafficking purposes is the amount represented; and that an ounce is greater than 28 grams is established scientific fact. Thus, that the district court did not take judicial notice that an ounce is 28.35 grams and did not so inform the jury was not an error requiring a new trial, and the jury's verdict of guilt for trafficking in 28 grams or more of methamphetamine was not contrary to the law or the evidence, and a new trial was not required in the interests of justice. (Appellant's brief, pp. 4-7.)

Lemmons responds by contending that "the conversion of an ounce into grams is not well known or universally accepted," the state's evidence was that an ounce is "about 28 grams," and therefore "the jury must have considered information that was not properly presented at trial, i.e., pursuant to the Idaho Rules of Evidence." (Respondent's brief, pp. 12-14.) At a later portion of the brief, Lemmons asserts that the jury must have relied on the prosecutor's (unobjected-to) argument that an ounce is more than 28 grams. (Respondent's brief, pp. 18-23.) Thus, Lemmons appears to be arguing that a new trial is warranted because of either jury or prosecutorial misconduct. She does not assert that the theory for a new trial articulated by the district court is correct.

Lemmons' alternative bases for affirming the district court's order granting her a new trial are without merit. First, there is no evidence whatsoever that the jury committed misconduct by considering evidence other than that admitted at trial. Second, neither the record nor the law support the claim that prosecutorial misconduct was a proper basis for granting a new trial.

B. Standard Of Review

The ruling on a motion for a new trial is reviewed for an abuse of discretion. State v. Cantu, 129 Idaho 673, 674, 931 P.2d 1191, 1192 (1997); State v. Howell, 137 Idaho 817, 819, 54 P.3d 460, 462 (Ct. App. 2002). "The trial judge does not abuse his or her discretion unless a new trial is granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial is manifestly contrary to the interest of justice." State v. Davis, 127 Idaho 62, 65, 896 P.2d 970, 973 (1995).

C. There Is No Evidence Of Juror Misconduct

A new trial may be granted for the jury misconduct of considering evidence not received in court. I.C. § 19-2406(2). To demonstrate entitlement to a new trial defendant must both "present clear and convincing evidence that juror misconduct has occurred" and demonstrate to the court that "the misconduct reasonably could have prejudiced the defendant." State v. Seiber, 117 Idaho 637, 640, 791 P.2d 18, 21 (Ct. App. 1989). In this case there is no evidence that any juror received or considered any evidence outside of court. Lemmons has

failed to support this claim with evidence, and therefore it is not an alternative ground for affirming the trial court's order granting a new trial.

D. Lemmons' Claim Of Prosecutorial Misconduct Is Without Merit

Although not entirely clear, Lemmons' brief on appeal could be construed as asserting a claim of prosecutorial misconduct as an alternative ground for affirming the district court. (Respondent's brief, pp. 18-23.) However, "prosecutorial misconduct" is "not among the grounds for a new trial delineated in I.C. § 19-2406" and therefore such an allegation presents "no basis for a new trial." State v. Priest, 128 Idaho 6, 15, 909 P.2d 624, 633 (Ct. App. 1995) (citing State v. Jones, 127 Idaho 478, 481, 903 P.3d 67, 70 (1995), for proposition that "trial court may not grant a new trial under I.C. § 19-2406 for prosecutorial misconduct"). To the extent Lemmons claims this is an alternative ground for affirming the order granting a new trial, such is erroneous.

Even if considered an appellate claim of trial error,[1] Lemmons' claim of fundamental error fails. "Where prosecutorial misconduct was not objected to at

[1] Lemmons' assertions regarding prosecutorial misconduct may not be considered as an independent issue on appeal because no claim of prosecutorial misconduct is asserted in her statement of the issues. (Respondent/Cross-Appellant's brief on Appeal, p. 5 (asserting as issues error in failing to grant acquittal on two counts of delivery and error in the jury instructions).) "Under the Idaho Appellate Rules, an appellant's failure to include in his initial appellate brief a fair statement of an issue presented for review results in waiver of the issue." CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 382-83, 299 P.3d 186, 189-90 (2013) (internal quotations and citations omitted). Thus, although the argument may be considered as an alternative ground *raised by the respondent* for affirming the district court's order for a new trial, Lemmons has not raised this issue *in her capacity as a cross-appellant*. In short, it may not be considered as a request for affirmative appellate relief.

trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error." State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). "Such review includes a three-prong inquiry wherein the defendant bears the burden of persua[sion]." Id. The first prong requires the defendant show that the alleged error "violates one or more of the defendant's unwaived constitutional rights." Id. Second, the defendant must show the error "plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision)." Id. Third, the defendant must show the error was "not harmless." Id.

Lemmons has failed to show any prong of the fundamental error test. In fact, she fails to even mention the three-prong fundamental error test in relation to her assertion of improper argument. (Respondent's brief, pp. 18-23.) She has not claimed, and has therefore failed to establish, any of these three prongs.

During the trial Detective Sweesy testified there were "[a]pproximately 28" grams in an ounce. (Trial Tr., p. 342, Ls. 3-4.) The prosecutor stated, in closing argument: "You also heard the testimony of Jerod Sweesy who said that an ounce is more than 28 grams." (Trial Tr., p. 411, Ls. 6-7.) This single statement cannot be interpreted as a direct quote, so it was merely a statement of the inference the prosecutor wished the jury to draw. Given that it is inarguable that an ounce equals 28.35 grams, the argument that "more than 28" is a reasonable interpretation of "approximately 28" does not rise to the level of violating due

process. Lemmons has failed to show that the argument was improper, much less that it rose to the level of a constitutional violation.

In addition, defense counsel did not object to this argument, but in his own argument responded:

> [The prosecutor] in his opening statement [sic] says that Mr. Sweesy declared under oath that an ounce is more than 28 grams? Where did that come from, ladies and gentlemen? That is not my recollection of Mr. Sweesy's testimony. As I recall it, and I have little doubt as to my recollection, but take it for what you will, he said it's approximately 28 grams. He didn't say more than the 28 grams. The only evidence before you as to what an ounce actually is is approximately 28 grams. Approximately, not more than. I urge you to rely upon your own recollection of his testimony, but that's certainly mine.

(Trial Tr., p. 429, Ls. 2-13.) That defense counsel chose to directly address the argument rather than object to it is strong evidence of a tactical decision. Lemmons has not claimed, much less demonstrated, that the error was plain and the objection not waived by tactical choice.

Finally, contrary to her argument on appeal, it is Lemmons that bears the burden of showing prejudice arising from fundamental error. Given the extensive discussion of that line of testimony, and the court's instruction that the jury is to make their own independent assessment of the evidence (which does not include arguments of counsel) (Trial Tr., p. 395, Ls. 6-22), there is no reason to believe the jury accepted the prosecutor's statement as evidence.

The district court erred when it concluded that lack of specific evidence or judicial notice that an ounce equals 28.35 grams required a new trial in this case. Lemmons has failed to establish alternative grounds for affirming the trial court.

ISSUES ON CROSS-APPEAL

The state rephrases the issues on cross-appeal as:

1. Is Lemmons' claim that double jeopardy bars appellate review of post-verdict determinations of the sufficiency of the evidence without merit?

2. Has Lemmons failed to show error in the lack of a specific instruction on judging the credibility of informants?

ARGUMENT ON CROSS-APPEAL

I.
Lemmons' Double Jeopardy Claim That A Post-Verdict Determination Of The Sufficiency Of The Evidence Is Not Reviewable Is Without Merit

A. Introduction

Lemmons contends that whether the district court was correct is "irrelevant" because she was "entitled to an acquittal when the District Court ruled that the State's evidence was legally insufficient to sustain a conviction." (Respondent's brief, pp. 7-11.) Lemmons also argues the evidence was insufficient to support her conviction, entitling her to an acquittal. (Respondent's brief, pp. 11-14.) Lemmons' first argument fails because the state's requested remedy—reinstatement of the jury verdicts—does not implicate double jeopardy. Her second argument fails because Lemmons waived her protections against double jeopardy by requesting a new trial based on trial error.

B. Standard Of Review

Whether a defendant's prosecution complies with the constitutional protection against double jeopardy is a question of law subject to free review. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000).

C. Double Jeopardy Does Not Bar The Reinstatement Of The Jury's Guilty Verdicts

Double jeopardy bars post-acquittal proceedings on guilt, but "does not preclude a prosecution appeal to reinstate the jury verdict of guilty." Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (citing United States v. Wilson, 420 U.S. 332, 352-53 (1975), and Smalis v. Pennsylvania, 476 U.S. 140, 145

(1986)); see also State v. Carmouche, 155 Idaho 831, ___, 317 P.3d 728, 733 (Ct. App. 2013) (quoting Smith). Notwithstanding Lemmons' claim to the contrary,[2] which relies on authority involving mid-trial acquittal by a court[3] and not a post-verdict finding, because the state is requesting this Court to vacate the district court's post-verdict order and reinstate the jury's verdict, double jeopardy is not implicated in this case.

D. Lemmons Waived Double Jeopardy Protections Insofar As She Requested The District Court To Vacate The Jury Verdict And Give Her A New Trial

"It has long been settled ... that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." Lockhart v. Nelson, 488 U.S. 33, 38 (1988). However, a determination that "the evidence is insufficient to prove a defendant's factual guilt," including "an appellate reversal of a conviction for insufficiency of the evidence" will (with the exception noted above where a guilty verdict is subsequently reinstated) bar a retrial. Blueford v. Arkansas, 132 S.Ct. 2044, 2054 (2012). Thus, if *the jury's verdict* is unsupported by evidence sufficient to

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[2] Lemmons also relies on Idaho statutory double jeopardy protection. (Respondent's brief, pp. 15, 23.) She has failed to articulate how the statute provides broader rights than constitutional double jeopardy protections. Because the statute bars "another indictment," I.C. § 19-1719, it is not even relevant to this case.

[3] Evans v. Michigan, 133 S.Ct. 1069, 1073 (2013) (cited at Respondent's brief, pp. 7-10), addressed a directed verdict entered at the conclusion of the prosecution's evidence and prior to any jury verdict.

sustain Lemmons' factual guilt, she is entitled to an acquittal. Otherwise, she is not. Review of the evidence shows that it is sufficient to prove Lemmons' factual guilt, and therefore she is not entitled to an acquittal.

To prove the delivery charges the state had to prove Lemmons knowingly delivered methamphetamine. (E.g., Trial Tr., p. 397, Ls. 3-10.) There is no doubt that the jury verdicts finding her guilty of these charges (R., pp. 810-11) are supported by sufficient evidence. At a minimum she is guilty of delivery.

Lemmons challenges the sufficiency of the evidence supporting the jury's finding that Lemmons represented that the amount of methamphetamine delivered was 28 grams or more, which elevated the delivery to trafficking. The evidence was that she did, in fact, represent that the amount was an ounce. (Trial Tr., p. 240, Ls. 8-16; p. 248, Ls. 12-17.) Because an ounce is greater than 28 grams, the evidence establishes Lemmons' guilt.

Lemmons contends "the State had to prove that there was 28.35 grams in an ounce." (Respondent's brief, p. 12.) She admits that the state could have proved this fact through judicial notice. (Respondent's brief, pp. 12-14.) Her first premise, which she supports with no legal authority, is false: how many grams in an ounce is not an element of the crime of trafficking. I.C. § 37-2732B(a)(4)(A). Lemmons' argument that the evidence is insufficient to support a matter other than an element of the crime is not a viable claim she is entitled to be acquitted. Her second premise inherently admits that the jury was not required to determine the number of grams in an ounce. Rather, she admits the trial court could have

taken notice of the English-metric conversion and simply *instructed* the jury on it. Again, there is no insufficiency of the evidence.

At a minimum, the evidence is sufficient to support the jury verdicts for delivery. Moreover, the evidence that Lemmons specifically represented the weight of the methamphetamine she delivered each time as an ounce is sufficient evidence of the trafficking amount of 28 grams or more. It is the state's position that a new trial, identical except for an instruction that an ounce equals 28.35 grams, is not warranted. An acquittal where the evidence established that the defendant represented the amount to be greater than 28 grams, merely because the jury was not specifically instructed on the English-metric conversion rate, is also not warranted.

II.
Lemmons Has Failed To Show She Was Entitled To A Specific Instruction On Judging The Credibility Of Informants

A. Introduction

At trial Lemmons requested a special instruction on determining the credibility of confidential informant testimony. (R., p. 788-89; Trial Tr., p. 383, L. 22 – p. 388, L. 4.) The district court determined that it would not vary from the Idaho pattern instructions regarding assessing the credibility of witnesses and that the instruction might be perceived as commentary on the evidence, and declined to give the proposed instruction. (Trial Tr., p. 388, L. 5 – p. 390, L. 13.) Lemmons contends that by denying her requested instruction the district court

violated her right to due process. (Respondent's brief, pp. 15-18.[4]) Lemmons has not argued, and therefore has not shown, that the district court's conclusion that the instructions it gave adequately provided the applicable law on evaluating credibility was in error.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587, 261 P.3d 853, 864-65 (2011); State v. Pina, 149 Idaho 140, 147, 233 P.3d 71, 78 (2010); State v. Young, 138 Idaho 370, 372, 64 P.3d 296, 298 (2002). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." Draper, 151 Idaho at 588, 261 P.3d at 865 (quoting State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010)).

C. The District Court's Rejection Of The Requested Instruction Was Consistent With Idaho Law

A proposed instruction may be rejected if it is "(1) an erroneous statement of the law; (2) adequately covered by other instructions; or (3) not supported by the facts of the case." State v. Severson, 147 Idaho 694, 710-11, 215 P.3d 414, 430-31 (2009) (internal quotation and citation omitted); see also State v. Molen,

[4] Lemmons' brief also mentions the Supremacy Clause, arguing that "federal legislation enacted pursuant to constitutionally derived federal authority trumps a conflicting state law" (Respondent's brief, p. 16), but articulates no basis for believing that the Clause should be extended from statutes to jury instructions in state criminal trials.

148 Idaho 950, 957, 231 P.3d 1047, 1054 (Ct. App. 2010). It has long been the law in Idaho that a court need not instruct the jury to "examine a paid informant's testimony with greater caution than the testimony of ordinary witnesses." State v. Spurr, 115 Idaho 898, 900, 771 P.2d 916, 918 (Ct. App. 1989). The court left open the possibility of using such an instruction "where the informant's testimony is the sole or primary evidence against the accused, or where the informant's testimony is uncorroborated," but did not face that circumstance in that case, where the informant's testimony was "almost entirely corroborated by tape recordings" and "further corroborated by physical evidence and by the testimony of law enforcement officers who monitored the transactions." Id. at 900-01, 771 P.2d 918-19. Under the circumstances of this case, where the informant's testimony was corroborated by recordings, physical evidence, and the testimony of monitoring law enforcement officers, the district court's ruling was entirely consistent with Idaho law.

CONCLUSION

The state respectfully requests this Court to reinstate the jury's guilty verdicts and remand this case for sentencing proceedings.

DATED this 28th day of April, 2014.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of April, 2014, I caused two true and correct copies of the foregoing REPLY/CROSS RESPONSE BRIEF to be placed in the United States mail, postage prepaid, addressed to:

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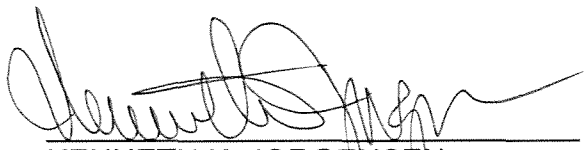

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